



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 15, 2004

Ms. Laura Rodriguez
Walsh, Anderson, Brown, Schulze & Aldridge
P.O. Box 460606
San Antonio, Texas 78246-060

OR2004-5882

Dear Ms. Rodriguez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 205323.

The Northside Independent School District ("NISD"), which you represent, received a request for all information relating to a named student and teacher. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Under FERPA, "education records" are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). The submitted information is both related to a student and maintained by NISD and is therefore subject to FERPA.¹

¹We note that, pursuant to FERPA, NISD has already redacted any information which might identify a student.

Under FERPA, an education agency or institution is generally required to provide parents of minor students access to the student's education records. *Id.* § 1232g(a)(1)(B). Thus, in this case, the requestor, as a parent of the student whose education records are requested, would generally have a right to the requested information under FERPA.² Similarly, section 26.004 of the Education Code provides that "[a] parent is entitled to access to all written records of a school district concerning the parent's child, including ... counseling records[.]" Educ. Code § 26.004. Thus, the requestor would normally have a right to the requested information under section 26.004.

We note, however, that the some of the submitted information is also subject to the federal Child Abuse Prevention and Treatment Act ("CAPTA"). CAPTA conditions federal grant funding for state child abuse prevention and treatment programs on the fulfilment of certain eligibility criteria and requires states to adopt methods to preserve the confidentiality of information concerning child abuse and neglect. *See* 42 U.S.C. § 5106a(b)(1)(A), § 5106a(b)(2)(A)(viii). In accordance with CAPTA, section 261.201(a)(2) of the Family Code makes confidential "the files, reports, records, communications, and working papers used or developed in an investigation under [chapter 261] or in providing services as a result of an investigation." The Department of Family and Protective Services ("DFPS") is an agency authorized to conduct an investigation in a school under chapter 261.³ Fam. Code §§ 261.103, .406. The submitted information includes an e-mail communication from DFPS. Because this document represents a communication developed in an investigation under chapter 261, this information is confidential per 261.201(a)(2). The remaining submitted information is not a file, report, record, communication or working paper *used or developed in an investigation under chapter 261* because the district is not an agency authorized to conduct an investigation under chapter 261. *See id.* Because you provide no indication that the remaining information at issue was developed or used in an investigation under chapter 261, we conclude that section 261.201 does not apply to the remaining submitted information.

Therefore, with regard to the e-mail communication from DFPS, the issue is the conflict of laws vis-à-vis a parent's right of access to the education record of his or her child when that record is the identity of a person making a report of alleged or suspected abuse or neglect under chapter 261. There is an inherent conflict between the provisions of FERPA and those of chapter 261 of the Family Code. FERPA requires an educational agency to release education records to parents of minor students. *Cf.* Gov't Code. § 552.114(b)(2)(granting

²NISD acknowledges that it is aware of the right of a parent to access to information about his own child under FERPA.

³We note, however, that if the DFPS has created a file on this alleged abuse, the child's parent(s) may have the statutory right to review that file. *See* Fam. Code § 261.201(g); Act of June 2, 2003, 78th Leg., R.S., ch. 198, § 1.27, 2003 Tex. Sess. Law Serv. 611, 641 ("A reference in law to the Department of Protective and Regulatory Service means the[DFPS].").

right of access to the student's parent or legal guardian). On the other hand, chapter 261 prohibits the disclosure of certain information concerning suspected child abuse.

We defer to the decision of the Family Compliance Office ("compliance office") of the United States Department of Education, the office responsible for interpreting and construing FERPA, to resolve this conflict between FERPA and chapter 261. The compliance office found that the Texas statute was promulgated pursuant to CAPTA and that any statutory conflict would therefore be between the two federal statutes rather than the Texas statute and FERPA. As the two federal statutes were in irreconcilable conflict, the compliance office concluded that CAPTA governs, being the later enacted statute. *See* Letter from Leroy S. Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, to Stacy Ferguson, Attorney, Schulman, Walheim & Heidelberg (Oct. 10, 1997); *see also Watt v. Alaska*, 451 U.S. 259, 267 (1981). Thus, the compliance office concluded that the CAPTA-compliant Texas Family Code provision concerning reporting suspected incidents of abuse or neglect prevailed over FERPA. We agree with the compliance office's ruling that CAPTA prevails over FERPA.

We note that there also exists a potential conflict between section 26.004 of the Education Code and chapter 261 of the Family Code. However, because chapter 261 was enacted pursuant to CAPTA, we conclude that any statutory conflict would actually be between CAPTA and section 26.004, rather than between the two Texas statutes. Such conflicts are governed by the Supremacy Clause, which provides that the laws of the United States "shall be the supreme Law of the Land [,] . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. State law that conflicts with federal law is preempted and "without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (citing *M'Culloch v. Maryland*, 17 U.S. 316 (1819)). Therefore, we conclude that in the instant case CAPTA also prevails over section 26.004. Consequently, under Texas law enacted in accordance with CAPTA, the e-mail communication from DFPS, which we have marked, is made confidential by section 261.201(a)(2) of the Family Code. Because section 552.101 of the Government Code excepts from disclosure information considered to be confidential by other statutes, we find that the information that we have marked is excepted from required public disclosure as information made confidential by law.

Concerning the remaining submitted information, we address your assertion that the identity of the person who reported the suspected child abuse should be withheld. Section 261.101 of the Family Code provides that the identity of an individual making a report under chapter 261 is confidential. *See* Fam. Code § 261.101(d). To resolve the question of whether this section conflicts with FERPA, we turn to another letter from the compliance office dealing with the relationship of FERPA and a CAPTA-compliant state statute. In this letter the compliance office stated:

The identity of the individual reporting suspected child abuse is not information or data about the student and, therefore, not the type of information Congress sought to protect in enacting FERPA.

Letter from Leroy S. Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, to Steven J. Sibner, Attorney, Durant, Sabanosh, Nichols & Houston (Mar. 14, 1994). Because the compliance office concluded that this information is not subject to FERPA, there is no conflict between FERPA and section 261.101(d).

As for the potential conflict of section 261.101(d) of the Family Code and section 26.004 of the Education Code, we again turn to CAPTA. Because we concluded above that CAPTA prevails over section 26.004, we find that under Texas law enacted in accordance with CAPTA, the identity of the person who reported the suspected child abuse is made confidential. *See* Fam. Code § 261.101(d). Because section 552.101 of the Government Code excepts from disclosure information considered to be confidential by other statutes, we find that the identity of the person who reported the suspected child abuse is excepted from required public disclosure as information made confidential by law. Consequently, you must withhold this information, which we have marked, from the remaining submitted records under section 552.101.

We next turn to your claim that Page AG-0008 contains a teacher evaluation. Section 21.355 of the Education Code provides, "A document evaluating the performance of a teacher or administrator is confidential." This office interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* Similarly, an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *Id.* Based on the reasoning set out in Open Records Decision No. 643, we conclude that the information marked on Page AG-0008 does not constitute an evaluation for the purposes of section 21.355 of the Education Code. Therefore, NISD may not withhold this information pursuant to section 552.101 of the Government Code.

We note that section 552.117 may also be applicable to some of the submitted information. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, NISD may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For an employee who timely elected to keep his personal information confidential, NISD

must withhold the employee's home address, home telephone number, and social security number which we have marked under section 552.117. NISD may not withhold this information under section 552.117 for an employee who did not make a timely election to keep the information confidential.

If NISD does not withhold the named teacher's personal information under section 552.117, we note in the alternative that his social security information may also be excepted from disclosure under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by NISD pursuant to any provision of law, enacted on or after October 1, 1990.

We next address your claim the cellular telephone number of an NISD police officer is protected under section 552.108. Section 552.108(b)(1) of the Government Code excepts from public disclosure an internal record of a law enforcement agency that is maintained for internal use in matters relating to law enforcement or prosecution if "release of the internal record or notation would interfere with law enforcement or prosecution." A governmental body that relies on section 552.108(b)(1) must sufficiently explain, if the requested information does not supply an explanation on its face, how and why the release of the information would interfere with law enforcement and crime prevention. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision Nos. 562 at 10 (1990), 531 at 2 (1989).

You state that the requested information includes internal cellular telephone numbers used by an officer of the NISD Police Department to carry out his law enforcement responsibilities. You assert that the release of this information would interfere with law enforcement because it would interfere with the ability of the police office to perform his job duties. In Open Records Decision No. 506 (1988), we determined that the statutory predecessor to section 552.108(b) excepted from disclosure "the cellular mobile phone numbers assigned to [Harris C]ounty officials and employees with specific law enforcement responsibilities." *Id.* at 2. We noted that the purpose of the cellular telephones was to ensure immediate access to individuals with specific law enforcement responsibilities and that public access to these numbers could interfere with that purpose. *Id.* Therefore, we conclude that because the cellular telephone number is assigned to an NISD police officer to be used

for law enforcement purposes, NISD may withhold this cellular telephone number under section 552.108(b)(1).

In summary, NISD must withhold the marked e-mail under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. As for the remaining submitted information, the NISD must withhold the identity of the person who reported the suspected child abuse, which we have marked, under section 552.101 in conjunction with section 261.101 of the Family Code. If the named teacher timely elected to keep his personal information confidential, the NISD must withhold the information we have marked under section 552.117. If the teacher did not timely make this election, then his social security number may be excepted from release under section 552.101 in conjunction with the federal Social Security Act. NISD may withhold the cellular telephone number of a NISD police office under section 552.108(b). The remaining information must be released to the requestor except to the extent it identifies students other than the requestor's son.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. David Floyd', with a stylized flourish at the end.

W. David Floyd
Assistant Attorney General
Open Records Division

WDF/sdk

Ref: ID# 205323

Enc. Submitted documents